Parties entering into business contracts often include provisions intended to transfer risks from one party to the other or to an insurance company. These include contracts for construction, services, product distribution, or property rental. Such indemnity and insurance provisions are often misunderstood and frequently become the subject of litigation. When the following basic rules regarding indemnity and insurance provisions are understood and the provisions are well drafted, litigation can be avoided.

I. AGREEMENTS TO INDEMNIFY

A. Definitions

An indemnity agreement involves a promise by one party (the indemnitor) to reimburse another party (the indemnitee) for the indemnitee’s loss, damage, or liability. Indemnity provisions sometimes include the terms “save harmless” and “hold harmless.” “Save harmless” and “hold harmless” are synonymous with “indemnify” and thus signify no separate duties.

B. Rules of Construction

1. In General

Indemnity agreements are contracts subject to the general rules and principles of contract construction. If the words of an indemnity agreement are clear and unambiguous, they are to be given their plain and ordinary meaning. An indemnity agreement will cover all losses and damages to which it reasonably appears the parties intended it to apply.

2. Indemnification for the Indemnitee’s Own Negligence

An agreement to indemnify another for the other’s own negligence is valid only if it is undertaken knowingly and willingly. Such indemnity agreements are disfavored by the courts because an undertaking by one party to pay for the negligence of another is an extraordinary, harsh burden that no party would lightly accept. These agreements must be clear and unequivocal and will be strictly construed. To clearly and unequivocally indemnify an indemnitee for the indemnitee’s own negligence, the indemnity provision must meet the following two criteria:
- The indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application; and
- The indemnification clause must expressly state in clear and unequivocal terms that it applies to the indemnification of the indemnitee by the indemnitor for the indemnitee’s own negligence.8

The following is an example of an indemnity agreement that the Indiana Court of Appeals found met the two criteria, and required indemnity for the indemnitee’s own negligence:

Contractor shall indemnify and hold harmless the Owner, the Architect, Engineer, and General Contractor and their agents and employees from and against all claims, damages, causes of action, losses and expenses, including attorney’s fees, arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom; and (2) is caused in whole or in part by any negligent act or omission of Subcontractor or any of Subcontractor’s agents, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether it is caused in part by a party indemnified hereunder.9

C. Statutory Limitations on Enforceability

The validity and enforceability of indemnity agreements can be affected by statutes or public policy. In construction contracts, for example, under Ind. Code § 26-2-5-1, an indemnity agreement that purports to indemnify the indemnitee for its sole negligence is void.10 Courts have held that the words “sole negligence” in this statute are not the same as the words “own negligence.” Thus, as long as the provision does not obligate an indemnitor to indemnify the indemnitee for the indemnitee’s own, sole negligence, it is not invalid.11 To read the statute to prohibit all agreements where a promisee may be indemnified for damages caused in part by its own negligence and in part by others would delete the word “sole” from the statute.12

In another example, the waiver of the landlord’s duties in a residential lease is void under Ind. Code. § 32-31-8-4, and this statute may apply to invalidate a residential tenant’s agreement to indemnify the landlord for the landlord’s negligence.13

II. AGREEMENTS TO PROCURE INSURANCE AND ADDITIONAL INSURED

A. Definitions

A provision in a contract requiring a party to procure insurance is an agreement to provide both parties with the benefits of insurance regardless of the cause of the loss.14 It is an agreement to shift the risk of loss to an insurance company rather than to one of the parties as an indemnity agreement does.15

B. Rules of Construction

Because the risk of loss is intended to be shifted to an insurance company instead of to one of the parties to the contract, the agreement to procure insurance is subject to the standard rules of contract interpretation, rather than the strict construction given to self-indemnification clauses.16 An agreement to procure liability insurance for the other party to the contract should expressly state that the insurance must name the party as an additional insured, not merely that a policy of liability insurance must be procured.
C. Agreement to Add the Other Party as An Additional Insured and Additional Insured Endorsements

1. In General

A party may comply with a promise to procure insurance and name the other party as an additional insured with one of a variety of endorsements to its insurance policy. Additional Insured Endorsements can be obtained that specifically name the additional insureds in a schedule. Blanket Additional Insured Endorsements are also available that provide coverage to anyone whom the named insured has agreed in a written contract to name as an additional insured. Typically, the Additional Insured Endorsement will limit the coverage for the additional insured to its liability connected to the named insured [often replaced with the word “you” as in the examples below], but the limiting language varies and it is important to review the exact language of the endorsement which is issued. Indiana courts have rejected the argument that Additional Insured Endorsements (regardless of language contained in them) will only insure the Additional Insured for its vicarious liability for the named insured’s conduct.17

2. Rules of Construction of Additional Insured Endorsements

Unambiguous insurance policy provisions will be given their plain and ordinary meaning. Ambiguous policy provisions are interpreted strictly against the insurer. However, Indiana courts have held that “[w]hen an unnamed insured seeks coverage under an insurance policy, courts may determine the general intent of the contract from a neutral stance.18

3. Scope of Additional Insured Coverage

In one sample case, the court examined an Additional Insured Endorsement that provided as follows:

\[
\text{WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.}^{19}
\]

The court held that coverage for “liability arising out of [the named insured’s] operations” was not limited to coverage for the additional insured’s liability arising out of the named insured’s negligence. Accordingly, the Additional Insured Endorsement covered the additional insured for its sole negligence which caused injury to the named insured’s employee while he was performing the named insured’s operations.

In another case, the court examined an Additional Insured Endorsement in a Commercial Policy issued to a tenant that provided:

\[
\text{WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule[.]}^{20}
\]

The court held that this provision it did not cover the Additional Insured for liability for failure to remove ice from a pathway leading into the leased premises on which the named insured’s employee fell because “the only way the fall was even remotely related to the leased premises was due to the fact [the employee] was on her way to work and such an ‘isolated connection’ is insufficient” to meet the requirement of the endorsement that the liability “arise out of” the ownership, maintenance or use of the part of the premises leased to the Named Insured.21
4. Agreements to Procure Insurance to Cover the Indemnity Agreement

Insurance procurement provisions can also be written to require a party to obtain insurance to cover its agreement to indemnify the other party. Additionally, standard Commercial General Liability ("CGL") forms contain language which would provide such insurance. CGL policies generally exclude coverage for breach of contract, but often contain exceptions for "Insured Contracts" which are defined as contracts connected to the named insured’s business under which it agrees to assume the tort liability of another party. An agreement in a contract related to the insured’s business to indemnify the other party for tort liability for bodily injury or property damage meets this definition of an “insured contract” in most insurance policies.22

Accordingly, even if an indemnitee does not meet the definition of an additional insured under an indemnitor’s policy, insurance for the named insured’s promise to indemnify the indemnitee can indirectly provide the indemnitee with insurance benefits from the named insured’s policy under the insured contract coverage of a CGL policy. “Insured Contract” coverage for indemnity obligations can also determine the priority of insurance policies of the parties to the insured contract, even when the policy provisions regarding the priority of coverage might provide a different priority.23

III. CONCLUSION

Contracts can be written to shift risks with indemnity agreements, agreements to procure insurance coverage and agreements to procure coverage for indemnity obligations. A well-written contract providing the maximum protection to one desiring to shift the risk will include all three. Keeping the basics in mind when drafting indemnity and insurance provisions and/or when procuring insurance can assist in avoiding mistakes that result in litigation over who is responsible for covering a risk that materializes.

---

2 Id. at 756–57.
4 Id.
10 Ind. Code § 26-2-5-1 provides:

Sec. 1. All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:
(1) death or bodily injury to persons;
(2) injury to property;
(3) design defects; or
(4) any other loss, damage or expense arising under either (1), (2) or (3);
from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable. (Emphasis added.)


12 Id.

13 Ransburg v. Richards, 770 N.E.2d 393 (Ind. Ct. App. 2002); but see West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc., 11 N.E.3d 531 (Ind. Ct. App. 2014) (explaining that an exculpatory provision, such as a release or waiver, is different from an indemnity agreement).


16 Id.


21 Id.

22 See e.g. Truck Ins. Exch. v. BRE Properties, Inc., 119 Wash. App. 582, 595–96, 81 P.3d 929, 935 (2003) (indemnity agreement was an “insured contract” and the insurer was required to provide coverage for any indemnification that its insured owed the indemnitee; West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc., 11 N.E.3d 531 (Ind. Ct. App. 2014).

23 See West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc., 11 N.E.3d 531 (Ind. Ct. App. 2014) (in which the court recognized ‘an indemnity agreement between the insureds or a contract with an indemnification clause ... may shift an entire loss to a particular insurer notwithstanding the existence of an “other insurance” clause in its policy”).

© Riley Bennett Egloff LLP

Disclaimer: Article is made available for educational purposes only and is not intended as legal advice. If you have questions about any matters in this article, please contact the author directly.

Permissions: You are permitted to reproduce this material in any format, provided that you do not alter the content in any way and do not charge a fee beyond the cost of reproduction. Please include the following statement on any distributed copy: “By Laura S. Reed © Riley Bennett Egloff LLP - Indianapolis, Indiana. www.rbelaw.com”